IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 56199-5-I
Appellant,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
JEFFREY WAYNE CORNE,	)	
	)	
Respondent.	)	FILED: _____

PER CURIAM. Following Jeffrey Corne's conviction by a jury of indecent liberties, Corne successfully moved to set aside the verdict on the ground that the trial court erred in failing to reinstruct the jury on the record when two alternative jurors were seated after deliberations had begun. The State appeals, contending that the trial court had properly instructed the reconstituted jury and that, even if it did not, any error was harmless. We disagree, and affirm.

FACTS

Corne was charged with indecent liberties by forcible compulsion, rape in the second degree, and burglary in the first degree after he entered the residence belonging to K.L. and her husband late one night and had sexual contact with K.L.

At the jury trial, K.L. testified that she awoke to find Corne in her residence and that she did not give him permission to be there. K.L. stated that Corne then touched her in a sexual manner. Corne testified the contact was consensual. After several

hours of deliberations, a problem arose with two jurors after they sent letters to the court questioning their impartiality. The court excused the two jurors and had the remaining jurors return the next day with two alternates. The reconstituted jury deliberated for nearly six hours before finding Corne guilty of indecent liberties and not guilty of the remaining counts. After returning the verdict, the jury was polled. Each juror confirmed that the verdict was both the verdict of the jury as a whole and the verdict of that individual juror.

Prior to sentencing, Corne moved to set a side the jury verdict on the ground that the trial court had failed to properly instruct the reconstituted jury on the record when two initial jurors were discharged and replaced with alternates. The motion was granted. This appeal followed.

DECISION

A criminal defendant has a constitutional right to an impartial, 12-person jury. State v. Johnson, 90 Wn. App. 54, 72, 950 P.2d 981 (1998). To ensure that right is adequately protected when a juror is discharged during deliberations and replaced with an alternate, the court must instruct the reconstituted jury to disregard all previous deliberations and begin deliberations anew. Johnson, 90 Wn. App. at 72-73; CrR 6.5.[1] The purpose of this requirement "is to assure jury unanimity–to assure the parties, the public and any reviewing court that the verdict rendered has been based upon the

[1] CrR 6.5 provides in relevant part:

> If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.

consensus of the 12 jurors who rendered the final verdict, based upon the common experience of all of them." State v. Ashcraft, 71 Wn. App. 444, 466, 859 P.2d 60 (1993).

Here the trial court, after excusing the two jurors, instructed the remaining ten jurors as follows:

> We are going to start deliberations. You are going to start deliberations from scratch. That means because you have to bring up, you have to bring Ms. Martin and Ms. Hansen up to speed, and what is very, very important is that you not to consider anything that might have been said today as potentially influencing you. And when I say that, I mean particularly anything that Mr. Parker and Mr. Schmid might have said, because they were excused because it was difficult for them to be something other than biased in this particular case, and therefore you certainly wouldn't want to think about something that came from somebody who was biased. They were unable to make the decision based on what they had heard from the witness stand, what the exhibits were, and we all know that's what you have to make your decisions based on. You really do have to start from scratch. Obviously you will be a lot more efficient about it tomorrow morning than you probably were getting started this afternoon. We will let you go as long as you want. If you are sick and tired of it, we want you to join Ms. Wright at her party at 10:30, leave at ten o'clock. It is entirely up to you. I'm not going to force you to do anything tomorrow that you don't want to do. If you don't make the decision tomorrow, obviously you will have to come back some other time.
>
> Any questions? I'm really sorry, I have to be honest with you, I have been in law for close to 35 years. I thought I had seen everything. Okay. Be careful, see you in the morning. 8:30. We'll have somebody at the back door to open up the door.

The State contends that this instruction adequately conveyed to the jury the need to disregard all prior deliberations and begin deliberations anew. The State notes that the court used the phrase "start deliberations from scratch." Because the court instructed the ten returning jurors to begin anew on the record and the two alternate

jurors could do nothing but begin anew since they had not yet deliberated, the State argues, there is no risk that the reconstituted jury did not deliberate anew as required under CrR 6.5. We disagree.

A similar claim was addressed in Ashcraft. In that case, the jury had already begun deliberations when the trial court replaced one juror with an alternate juror without a record of reinstruction. The reconstituted jury returned a verdict of guilty for two counts of second degree assault and guilty of the lesser included offense of simple assault. On appeal, this court agreed with Ashcraft that "it was reversible error of constitutional magnitude to fail to instruct the reconstituted jury on the record that it must disregard all prior deliberations and begin deliberations anew." Ashcraft, 71 Wn. App. at 464 (emphasis in original). In reaching that conclusion, we noted that "[i]t is not beyond the realm of reasonable possibility that . . . the alternate and the remaining 11 initial jurors could have concluded, in all good faith but erroneously, that they need not deliberate anew as to any counts or issues upon which the initial 12 jurors may have reached agreement." Ashcraft, 71 Wn. App. at 466-67.

The State's attempt to distinguish Ashcraft is not persuasive. Here, as in Ashcraft, the jury was not properly reinstructed on the record. While it is true that the trial court reinstructed the remaining ten initial jurors, the admonishment was confusing because it told them to both "start deliberations from scratch" and to bring the two alternates that would join them "up to speed." Nor was the error cured the following day when the trial court's bailiff spoke to the reconstituted jury. The remarks were off the

record. Under the circumstances, there is simply no way to determine what was said or assess its possible impact. Therefore, the State has failed to carry its burden of showing that jury unanimity was preserved. The trial court properly granted the defense motion to set aside the guilty verdict.

Affirmed.

FOR THE COURT:

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